



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: JULY 19, 2022

IN THE MATTER OF:

Appeal Board No. 622295

PRESENT: MICHAEL T. GREASON, MEMBER

The Department of Labor issued the initial determinations ruling the claimant not entitled to receive benefits, effective September 27, 2021, on the basis that the claimant was unable to file a valid original claim pursuant to Labor Law § 527 because the claimant had insufficient earnings in covered base

period employment. The claimant requested a hearing.

The Administrative Law Judge held telephone conference hearings at which all parties were accorded a full opportunity to be heard and at which testimony was taken. There was an appearance by the claimant. By decision filed March 21, 2022 (), the Administrative Law Judge overruled the initial determinations.

The Commissioner of Labor appealed the Judge's decision to the Appeal Board. The Board considered the arguments contained in the written statement submitted on behalf of the Commissioner of Labor.

Based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant filed a claim for benefits in February 2020 and thereafter received Pandemic Unemployment Assistance benefits, at the rate of \$504, plus an additional \$300, through

September 5, 2021. The Pandemic Unemployment Assistance (PUA) program was terminated on September 5, 2021.

The claimant filed another claim for benefits on, and effective, September 27, 2021 establishing a base period from April 1, 2020 through March 31, 2021 and an alternate base period from July 1, 2020 through June 30, 2021. During these periods, the claimant performed services on behalf of his program and project management business which he had registered as a Limited Liability Company (LLC) with the New York State Department of State on March 28, 2016. He is its sole member and owner. He paid himself remuneration through the company, as its sole employee, amounting to \$15,358 in the second quarter of 2020, \$7692.31 in the first quarter of 2021 and \$7692.31 in the second quarter of 2021.

At the start of the business, the claimant applied to the United States Internal Revenue Service (IRS) to treat his LLC as an S corporation for tax purposes; this was granted, effective March 28, 2016. Additionally, his application to the New York State (NYS) Department of Tax and Finance for his LLC to be treated as a New York subchapter S corporation for tax purposes was approved, to be effective January 1, 2016. The claimant's business filed quarterly wage reports to New York State, and paid unemployment insurance taxes to New York State.

OPINION: The credible evidence establishes that when the claimant filed for benefits in February 2020, he was granted PUA benefits, a federal program designed for persons who did not otherwise qualify for regular Unemployment Insurance, but who did meet the qualifications for PUA benefits. Those programs terminated on September 5, 2021. No statute provides for the extension of the claimant's benefit year beyond the expiration of those federal programs.

The credible evidence also establishes that the claimant filed a new claim for benefits on September 27, 2021, establishing a base period from April 1, 2020 through March 31, 2021 and an alternate base period from July 1, 2020 through June 30, 2021; and that the claimant performed services on behalf of his program and project management business and received remuneration through his company, as its sole employee, amounting to \$15,358 in the second quarter of 2020, \$7692.31 in the first quarter of 2021 and \$7692.31 in the second quarter of 2021. The issue before us is whether the services the claimant performed on behalf of his business was "employment" for Unemployment Insurance purposes such that his earnings could be used to establish a valid original claim for regular Unemployment Insurance benefits. It is undisputed that the claimant registered his business with the NYS Department of State as an LLC, of which

he was the sole member and owner. While the claimant sought and received approval from the IRS to treat his LLC as a subchapter S corporation for tax purposes, the record does not establish that the business was converted to a subchapter S corporation for legal purposes, and the company was and remains a Limited Liability Company. Although the NYS Department of Taxation and Finance allowed the election of corporate status for income tax purposes, there is no similar provision within the NYS Unemployment Insurance Law to treat an LLC as a corporation. The state is not bound by IRS rulings (Matter of Enjoy the Show, 287 AD 2d 822 [3rd Dept 2001] and Matter of Weltman, 25 AD2d 914 [3rd Dept 1966]). The claimant was and is a managing member and owner of his LLC. It is well-settled that a person who is self-employed or a partner in a business is not in covered employment for purposes of calculating a valid original claim (See Matter of Heymann, 192 AD2d 861); additionally, managing members of an LLC are not considered to have covered employment with that LLC and are not entitled to regular Unemployment Insurance benefits (See Appeal Board Nos. 550885 and 549756). Accordingly, we cannot conclude that the claimant was employed for Unemployment Insurance purposes in covered employment with his program and project management company and therefore the remuneration he received from that company during his base period may not be used to establish a valid original claim for benefits.

DECISION: The decision of the Administrative Law Judge is reversed.

The initial determinations, ruling the claimant not entitled to receive benefits, effective September 27, 2021, on the basis that the claimant was unable to file a valid original claim pursuant to Labor Law § 527

because the claimant had insufficient earnings in covered base period employment, are sustained.

The claimant is denied benefits with respect to the issues decided herein.

MICHAEL T. GREASON, MEMBER